

NOT FOR PUBLICATION

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

DANIEL POWELL, :
 : Civil Action No. 05-3253 (FLW)
Petitioner, :
 :
v. : **OPINION**
 :
ATTORNEY GENERAL :
PETER HARVEY, et al., :
Respondents. :

APPEARANCES:

Petitioner <u>pro se</u>	Counsel for Respondents
Daniel Powell	Joie Piderit
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WOLFSON, District Judge

This matter is before the Court on Petitioner Daniel Powell's Petition for habeas corpus relief under 28 U.S.C. § 2254. By Opinion [18] and Order [19] entered January 30, 2007, this Court ordered Respondents to supplement their answer with documentation regarding Petitioner's state-court petition for post-conviction relief and ordered all parties to show cause why this matter should not be stayed pending conclusion of Petitioner's state-court post-conviction relief proceedings.

Respondents have supplemented their answer with the appropriate exhibits. Neither party has addressed the question

whether this matter should be stayed pending resolution of the pending state-court post-conviction relief proceedings.

I. BACKGROUND

The relevant facts are set forth in the opinion of the Superior Court of New Jersey, Appellate Division.¹

Two different police officers from the Lakewood Police Department observed defendant in his parked car in the driveway of a residence for almost eight hours. When Officer Daniel Tworkoski stopped to investigate further, it was around 12:50 a.m. The initial observation was made at around 3:00 p.m.

It took approximately fifteen minutes for Officer Tworkoski to ascertain that defendant was parked in his sister's driveway. Defendant nevertheless appeared nervous and the officer asked him to step out of his car. Defendant instead drove off at a high rate of speed colliding into Tworkoski's patrol car. He then backed up his car, requiring Tworkoski to jump out of the way to avoid being run over. Defendant sped away as Sergeant Guillermo Clarke fired three shots at the vehicle's tires in an attempt to stop defendant from fleeing.

After a high speed chase, defendant was apprehended and arrested for eluding, criminal mischief and aggravated assault. The police also discovered 3.2 grams of cocaine in a locked cigarette box located under the driver's seat and an additional 8.1 grams of cocaine in the pocket of a camouflage jumpsuit found in the trunk.

(App. Div. at 2-3.)

¹ Pursuant to 28 U.S.C. § 2254(e)(1), "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

In the Superior Court of New Jersey, Law Division, Ocean County, Petitioner was convicted after a jury trial of second-degree eluding, N.J.S.A. 2C:29-2b, and third-degree possession of cocaine, N.J.S.A. 2C:35-10a(1). He was acquitted of two counts of third-degree aggravated assault, N.J.S.A. 2C:12-1b(2), fourth-degree criminal mischief, N.J.S.A. 2C:17-3a(1), and third-degree possession of cocaine, N.J.S.A. 2C:35-10a(1). On April 11, 2003, Petitioner was sentenced to an aggregate term of ten years with four years of parole ineligibility.

On direct appeal, Petitioner raised through counsel the following arguments:

Point I

Trial Court erred by denying Defendant's appropriate motion to suppress evidence

Point II

Defendant was denied the effective assistance of counsel

Point III

The sentence imposed by the Court is manifestly excessive

To the extent Petitioner prepared a pro se supplemental brief, it does not appear to have been submitted to the Appellate Division. By Opinion entered July 21, 2004, the Superior Court of New Jersey, Appellate Division, affirmed the conviction and sentence. The Appellate Division declined to address the claim of

ineffective assistance of counsel, noting that Petitioner was free to raise this claim in a post-conviction relief petition.

On January 19, 2005, the Supreme Court of New Jersey denied certification. State v. Powell, 182 N.J. 428 (2005). Petitioner did not petition the United States Supreme Court for certiorari. Accordingly, for purposes of federal habeas review, Petitioner's conviction became final on April 19, 2005.

Petitioner submitted to this Court the pending Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, dated June 24, 2005, and received by this Court on June 27, 2005. That portion of the Petition asserting the claims for relief is presented in narrative fashion, from which this Court has discerned the following claims: (1) ineffective assistance of trial counsel, (2) violation of the Fourth Amendment proscription against unreasonable search and seizure, (3) prosecutorial misconduct through the use of perjured or hearsay evidence before the grand jury, use of perjured testimony at trial, reference to Petitioner's prior criminal record, failure to disclose at trial that one or more of the testifying officers were members of a drug task force, (4) violation of the Confrontation Clause through the introduction of hearsay testimony regarding the reason for the officers' investigation of Petitioner and the discovery of the cocaine in his automobile, (5) imposition of a sentence that was excessive, under state law, and which violates

Apprendi v. New Jersey, 530 U.S. 466 (2000) and Blakely v. Washington, 542 U.S. 296 (2004), and (6) beatings and denial of proper medical care while in prison.²

Respondents filed an answer [15] asserting that the claims of ineffective assistance of counsel and unconstitutional sentence were unexhausted, and that the Petition should therefore be dismissed as a mixed petition. In fact, the only claims that were exhausted on direct appeal were the Fourth Amendment claims and the claim that the sentence is unlawful under state law.

On a date not available to this Court based upon the record presented, Petitioner filed a motion with the state court for post-conviction relief. The record supplied to this Court in the Answer did not reveal the nature of the claims asserted in the state-court motion for post-conviction relief or the status of that proceeding. Accordingly, this Court ordered Respondents to supplement the Answer with documents regarding the motion for post-conviction relief and ordered both parties to show cause whether this Petition should be stayed pending conclusion of the state post-conviction relief proceedings.

As noted above, Respondents have supplemented their Answer. The supplemental letter and exhibits [20, 21] reveal that Petitioner filed a pro se motion for post-conviction relief in

² Any claim that prison conditions violate the Eighth Amendment should be brought as a separate civil action pursuant to 28 U.S.C. § 1983.

the trial court sometime after the Supreme Court of New Jersey denied certification in his direct appeal. Neither the pro se petition nor the subsequent brief in support filed by appointed counsel is dated. (Letter, RE8 and RE8 at Pa9.) The motion for post-conviction relief raises several of the claims asserted here that were not exhausted on direct appeal. The government's letter in opposition to the motion for post-conviction relief is dated March 23, 2006, and the order denying post-conviction relief is dated April 11, 2006. (Letter, RE5, RE7.) Petitioner timely appealed the denial of post-conviction relief and the matter remains pending before the Superior Court of New Jersey, Appellate Division. (Letter, RE1, RE2, RE3, RE4.) Thus, the state post-conviction relief proceedings are not yet concluded.

No party has addressed the question whether this matter should be stayed pending conclusion of the state post-conviction proceedings.

II. ANALYSIS

As this Court has noted previously, a state prisoner applying for a writ of habeas corpus in federal court must first "exhaust[] the remedies available in the courts of the State," unless "there is an absence of available State corrective process[] or ... circumstances exist that render such process ineffective" 28 U.S.C. § 2254(b)(1). See also Rose v. Lundy, 455 U.S. 509, 515 (1982); Lambert v. Blackwell, 134 F.3d

506, 513 (3d Cir. 1997), cert. denied, 532 U.S. 919 (2001) (finding that "Supreme Court precedent and the AEDPA mandate that prior to determining the merits of [a] petition, [a court] must consider whether [petitioner] is required to present [his or her] unexhausted claims to the [state's] courts").

Respondents have elected to assert the defense of failure to exhaust and have asked this Court to dismiss the Petition as unexhausted. (Answer at 21.)

The exhaustion doctrine is a "total" exhaustion rule. That is, "a district court must dismiss habeas petitions containing both unexhausted and exhausted claims [('mixed' petitions)]." Lundy, 455 U.S. at 522. At the time Lundy was decided, there was no statute of limitations on the filing of federal habeas petitions. The enactment in 1996 of a one-year limitations period for § 2254 habeas petitions,³ however, "'has altered the context in which the choice of mechanisms for handling mixed petitions is to be made.'" Crews v. Horn, 360 F.3d 146, 151 (3d Cir. 2004) (quoting Zarvela v. Artuz, 254 F.3d 374, 379 (2d Cir.), cert. denied, 534 U.S. 1015 (2001)). Because of the one-year limitations period, dismissal of a timely-filed mixed petition may forever bar a petitioner from returning to federal court. "Staying a habeas petition pending exhaustion of state remedies is a permissible and effective way to avoid barring from

³ See 28 U.S.C. § 2244(d).

federal court a petitioner who timely files a mixed petition.” Crews, 360 F.3d at 151. Indeed, the Court of Appeals for the Third Circuit has held that “when an outright dismissal could jeopardize the timeliness of a collateral attack, a stay is the only appropriate course of action.” Crews, 360 F.3d at 154.

The Supreme Court has somewhat limited the stay-and-abeyance rule announced in Crews.

[S]tay and abeyance should be available only in limited circumstances. ... [S]tay and abeyance is only appropriate when the district court determines there was good cause for the petitioner’s failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless.

...

On the other hand, it likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics. In such circumstances, the district court should stay, rather than dismiss, the mixed petition. ... For the same reason, if a petitioner presents a district court with a mixed petition and the court determines that stay and abeyance is inappropriate, the court should allow the petitioner to delete the unexhausted claims and to proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair the petitioner’s right to obtain federal relief.

Rhines v. Weber, 544 U.S. 269, 277-78 (2005) (citations omitted).⁴

Clearly, Petitioner has failed to exhaust some of the claims asserted here. This is a "mixed" petition. Accordingly, this Court must now address whether the Petition should be dismissed or stayed. The first issue to address in this analysis is whether outright dismissal would prejudice the timeliness of a subsequent federal habeas petition.

The limitations period for a § 2254 habeas petition is set forth in 28 U.S.C. § 2244(d),⁵ which provides in pertinent part:

(1) A 1-year period of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; ...

⁴ Even where stay and abeyance is appropriate, the district court's discretion in structuring the stay is limited by the timeliness concerns reflected in the one-year statute of limitations. "Thus, district courts should place reasonable time limits on a petitioner's trip to state court and back." Id. at 278. See also Crews, 360 F.3d at 154 ("If a habeas petition is stayed, the petitioner should be given a reasonable interval, normally 30 days, to file his application for state post-conviction relief, and another reasonable interval after the denial of that relief to return to federal court. If a petitioner fails to meet either time-limit, the stay should be vacated nunc pro tunc."). (citations omitted).

⁵ The limitations period is applied on a claim-by-claim basis. See Fielder v. Verner, 379 F.3d 113 (3d Cir. 2004), cert. denied, 543 U.S. 1067 (2005); Sweger v. Chesney, 294 F.3d 506 (3d Cir. 2002).

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this section.

Thus, evaluation of the timeliness of a § 2254 petition requires a determination of, first, when the pertinent judgment became "final," and, second, the period of time during which an application for state post-conviction relief was "properly filed" and "pending."

A state-court criminal judgment becomes "final" within the meaning of § 2244(d)(1) by the conclusion of direct review or by the expiration of time for seeking such review, including the 90-day period for filing a petition for writ of certiorari in the United States Supreme Court. See Swartz v. Meyers, 204 F.3d 417, 419 (3d Cir. 2000); Morris v. Horn, 187 F.3d 333, 337 n.1 (3d Cir. 1999); U.S. Sup. Ct. R. 13.

To statutorily toll the limitations period, a state petition for post-conviction relief must be "properly filed."

An application is "filed," as that term is commonly understood, when it is delivered to, and accepted by the appropriate court officer for placement into the official record. And an application is "properly filed" when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee. In some jurisdictions the filing requirements also include, for example, preconditions imposed on particular abusive filers, or on all filers generally. But in common usage, the question whether an application has been

"properly filed" is quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar.

Artuz v. Bennett, 531 U.S. 4, 8-9 (2000) (citations and footnote omitted) (finding that a petition was not "[im]properly filed" merely because it presented claims that were procedurally barred under New York law on the grounds that they were previously determined on the merits upon an appeal from the judgment of conviction or that they could have been raised on direct appeal but were not).

Where a state court has rejected a petition for post-conviction relief as untimely, however, it was not "properly filed" and the petitioner is not entitled to statutory tolling under § 2244(d)(2). Pace v. Diguglielmo, 544 U.S. 408 (2005). This is so even where, in the alternative, the state court addresses the merits of the petition in addition to finding it untimely. Carey v. Saffold, 536 U.S. 214, 225-26 (2002).

An application for state post-conviction relief is considered "pending" within the meaning of § 2244(d)(2), and the limitations period is statutorily tolled from the time it is "properly filed," during the period between a lower state court's decision and the filing of a notice of appeal to a higher court, Carey v. Saffold, 536 U.S. 214 (2002), and through the time in which an appeal could be filed, even if the appeal is never filed, Swartz v. Meyers, 204 F.3d at 420-24. However, "the time

during which a state prisoner may file a petition for writ of certiorari in the United States Supreme Court from the denial of his state post-conviction petition does not toll the one year statute of limitations under 28 U.S.C. § 2244(d)(2).” Stokes v. District Attorney of the County of Philadelphia, 247 F.3d 539, 542 (3d Cir.), cert. denied, 534 U.S. 959 (2001).

The limitations period of § 2244(d) also is subject to equitable tolling. Fahy v. Horn, 240 F.3d 239, 244 (3d Cir.), cert. denied, 534 U.S. 944 (2001); Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999); Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616, 618 (3d Cir. 1998). Equitable tolling applies

only when the principles of equity would make the rigid application of a limitation period unfair. Generally, this will occur when the petitioner has in some extraordinary way been prevented from asserting his or her rights. The petitioner must show that he or she exercised reasonable diligence in investigating and bringing the claims. Mere excusable neglect is not sufficient.

Miller, 145 F.3d at 618-19 (citations and punctuation marks omitted). Among other circumstances, the Court of Appeals for the Third Circuit has held that equitable tolling may be appropriate “if the plaintiff has timely asserted his rights mistakenly in the wrong forum,” i.e., if a petitioner has filed a timely but unexhausted federal habeas petition. Jones, 195 F.3d at 159. See also Duncan v. Walker, 533 U.S. 167, 183 (2001) (Stevens, J., joined by Souter, J., concurring in part) (“neither

the Court's narrow holding [that the limitations period is not statutorily tolled during the pendency of a premature federal habeas petition], nor anything in the text or legislative history of AEDPA, precludes a federal court from deeming the limitations period tolled for such a petition as a matter of equity"); 533 U.S. at 192 (Breyer, J., dissenting, joined by Ginsburg, J.) (characterizing Justice Stevens's suggestion as "sound").

Finally, "a pro se prisoner's habeas petition is deemed filed at the moment he delivers it to prison officials for mailing to the district court." Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998) (citing Houston v. Lack, 487 U.S. 266 (1988)).

As noted above, Petitioner's conviction became final, for purposes of the federal limitations period, on April 19, 2005. Thus, absent tolling, Petitioner had until April 19, 2006, to file a federal habeas petition. That one-year limitations period has been tolled, however, by Petitioner's filing of a state motion for post-conviction relief, which appears to have been properly filed⁶ and which remains pending. Because the parties have not advised the Court, however, as to the date on which the state-court motion was filed, nor has a copy of the trial court

⁶ In its letter in opposition to the motion for post-conviction relief, the government asserts that certain claims are barred but does not assert that the motion is not timely or is otherwise not "properly filed." The state court did not make any finding that the motion was untimely or otherwise not properly filed. (Letter, RE5, RE6, RE7.)

docket been provided, it is not possible to determine the specific date on which the limitations period began to toll by the filing of the state motion for post-conviction relief. What is clear, however, is that the state motion was filed some time before the government filed its letter in opposition on March 23, 2006, twenty-seven (27) days before the limitations period otherwise would have expired.

Thus, dismissal of this mixed petition would not impair Petitioner's ability to file a timely federal petition after conclusion of his state post-conviction proceedings. Petitioner would have at least 27 days after the conclusion of state post-conviction proceedings in which to file a federal petition, and presumably some additional time during which his state motion for post-conviction relief was "pending" before the government filed its letter in opposition.

III. CONCLUSION

For the foregoing reasons, this Court finds that the Petition is a mixed petition containing some unexhausted claims. As a stay would not be appropriate in this instance, the Petition will be dismissed without prejudice to the filing of a timely petition following the conclusion of state post-conviction proceedings. An appropriate Order follows.

s/Freda L. Wolfson
Freda L. Wolfson
United States District Judge

DATED: 5/14/07